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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

EAC 05 225 52662

Office: VERMONT SERVICE CENTER

Date:

OCT 20 2006

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a National Certified Defense Language Tester. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner asserts that the Department of Defense invested money in his training and that there are no U.S. workers available to test proficiency in Mandarin and Cantonese. Beyond the alleged benefits of his employment, the petitioner seeks a waiver of the labor certification requirement for humanitarian reasons. For the reasons discussed below, we concur with the director that the petitioner has not demonstrated that his proposed employment warrants a waiver of the labor certification process in the national interest. In addition, the petitioner cites no legal authority, and we know of none, that the national interest waiver, which allows an alien to essentially forego the labor certification process before the Department of Labor (DOL), was intended as a humanitarian waiver of an alien's failure to maintain lawful status in the United States regardless of the circumstances.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As defined at Section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(k)(2), in defining advanced degree, further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience *in the specialty* shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." (Emphasis added.)

The petitioner holds a Master's degree in Applied Mathematics from Zhongshan University. The director did not contest that the petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner, however, seeks to work as a National Certified Language Tester, not a teacher at an elementary or secondary school, college, academy or seminary. The petitioner has not established that a baccalaureate degree is required of these language testers. As such, the petitioner has not established that he seeks to work as a member of the professions.

Moreover, the petitioner has not explained how his advanced degree in Applied Mathematics relates to his proposed employment. The national interest waiver is only available to advanced degree professionals and aliens of exceptional ability. Where experience is considered equivalent to the advanced degree, it must be experience in the specialty in which the alien seeks classification. Thus, it is the expertise apparent from the advanced degree, experience in the specialty or the exceptional ability that allows an alien to seek a waiver of the labor certification process in the national interest. The petitioner does not claim to be an alien of exceptional ability and submits no evidence relating to the criteria for that classification, set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(ii). Thus, eligibility to seek the national interest waiver of the labor certification process appears based on the alien's abilities in his specialty rather than solely in recognition of completing a degree regardless of relevance. In other words, there must be some nexus between the advanced degree and the proposed employment. Without evidence that the petitioner's advanced degree relates to his proposed employment, we cannot conclude that he qualifies for classification as an advanced degree professional.

While the director did not raise the petitioner's eligibility for the classification sought, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner entered the United States in July 2000 on a student visa to attend Preston University in Wyoming. While the petitioner lists on his Form G-325A, submitted in support of his Form I-485 Application to Register Permanent Residence or Adjust Status, employment and residences in Wyoming from July 2000 to December 2002, the record lacks evidence that the petitioner obtained a degree from Preston University. The petitioner then obtained a nonimmigrant visa for employment with the Shonto Governing Board of Education in Arizona, valid from August 2003 to June 2004. The Cincinnati Board of Education subsequently filed a nonimmigrant visa petition in the petitioner's behalf, which was approved. The visa was valid from June 1, 2004 to August 18, 2006. Due to confusion regarding whether the petitioner needed to leave the United States to retain his lawful

nonimmigrant status, the petitioner lost that status, resulting in the Cincinnati Board of Education requesting that the nonimmigrant visa petition be revoked, which it was.

██████████ Director of Professional Programs at the American Council on the Teaching of Foreign Languages (ACTFL), asserts that ACTFL, in addition to its main mission of promoting the study of foreign languages and cultures, has been contracted by the Department of Defense and the Defense Language Institute (DLI) to support DLI's testing and training initiatives. According to Dr. ██████████, the petitioner completed training as an ACTFL/ILR Oral Proficiency Interview (OPI) tester allowing him to conduct and second-rate interviews in Cantonese and Mandarin for the Department of Defense. The petitioner "receives an honorarium payment of \$40.00 for conducting each interview and \$15.00 for second-rating an interview." ██████████ does not indicate how many interviews the petitioner has conducted. The petitioner also submitted a certificate from ACTFL confirming his training.

In response to the director's request for additional evidence, the petitioner asserted that DLI spent a lot of money training him and that his job serves U.S. government officers and military personnel nationwide. He further asserted that the job requires a native proficiency level in Mandarin and Cantonese and, thus, "is unavailable to US workers to undertake it according to the rules." The petitioner claimed to have conducted more than 100 interviews. The petitioner submitted evidence of his stipend during training, but no payments for his interviews.

We concur with the director that the petitioner works in an area of intrinsic merit, foreign language certification for DLI. The director concluded that the proposed benefits of the petitioner's work would not be national in scope. On appeal, the petitioner submits a copy of his letter to Senator Jack Reed asserting:

One thing is required is a national impact as a national interest waive[r] petition. The documents (attached) we provided looked not enough [sic].

It seems USCIS didn't consider we were innocence [sic] for our legal statues [sic] case from the very beginning. It was in [the] US, a nation under God for all, we had been forced from legal to illegal. It was in [the] US, a nation [that] cherishes universal human rights, [where] we had been forced to lose legal rights and thus to lose human rights as well. The petitions are the only way to get our legal rights back. From this point of view, our case doses [sic] have a national impact.

In a separate letter, the petitioner asserts that his children, all born in the United States, will require public assistance if the visa petition is not approved thereby allowing the petitioner to work lawfully in the United States. The petitioner also reiterates the statements made in response to the director's request for additional evidence. Finally, the petitioner submitted a January 6, 2006 *New York Times* article reporting on President George W. Bush's proposal to expand the teaching of Arabic, Chinese, Farsi and other languages not typically taught in public schools.

The petitioner is not seeking a waiver of his unlawful status, an issue relevant only at the adjustment of status or immigration stage should an immigrant visa petition in his behalf be approved. Rather, he is seeking a waiver of the Department of Labor's labor certification process. It is not a humanitarian waiver that allows for hardship considerations. Rather, the waiver must be based on the petitioner's ability to benefit the national interest in his occupation. See *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217. The newspaper article submitted on appeal merely confirms that training and, by extension, certification in a foreign language has intrinsic merit. We have already acknowledged that the petitioner works in an area of intrinsic merit. The petitioner, however, does not propose to impact the teaching of foreign languages. As noted above, the petitioner's advanced degree is in Applied Math, not education or a language-related field. We acknowledge that having military personnel fluent in foreign languages is in the national interest. In addressing the issue of "national scope," *Matter of New York State Dep't of Transp.* 22 I&N Dec. at 217, states:

For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3. The record lacks evidence regarding the number of OPI testers in the United States or what percentage of the military personnel seeking certification in Mandarin or Cantonese the petitioner interviewed after he became certified. The record also lacks evidence whether the petitioner conducts interviews nationwide. The petitioner does not submit confirmation from the Department of Defense or ACTFL supporting his claim to have interviewed over 100 individuals. Thus, the petitioner has not established that the benefits of his work at the national level are significant.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner's main assertion appears to be that the Department of Defense has already invested in his training; thus, it is in the national interest to allow him to work in the position for which he was trained. ACTFL, not the Department of Defense, however, trained the petitioner. That ACTFL chose to train an individual who had yet to receive authorization to remain in the United States to work after training does not in any way obligate Citizenship and Immigration Services (CIS) to issue a national interest waiver. Thus, the main argument throughout the proceedings is not persuasive.

The fact that the beneficiary happens to originate from China and, thus, speaks Mandarin and Cantonese, is not evidence that he has made or will make an impact on the field of foreign language certification. Assuming no U.S. workers are available to certify knowledge of Mandarin and Chinese, that issue falls under the jurisdiction of the Department of Labor. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221. The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all trilingual aliens providing foreign language fluency certification services to the government. Moreover, teaching and training in a foreign language will have a far greater impact on the number of military recruits fluent in a foreign language than mere certification. The petitioner has submitted no evidence that he is qualified to teach Mandarin or Chinese or influence the way these languages are taught.

Finally, the petition was filed on August 5, 2005. The letter from [REDACTED] confirming the petitioner's completion of the ACTFL training is dated April 18, 2005. The petitioner submits no evidence to support his claim to have conducted over 100 interviews. Given this brief record as an OPI tester as of the date of filing, the petitioner has not established a track record of success with some degree of influence on the field as a whole. See *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 219, n.6; 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.